# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

CAREER SYSTEMS DEVELOPMENT CORPORATION

Case 1-CA-46727

and

MAINE EDUCATION ASSOCIATION

## RESPONDENT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

#### Background

The procedural background to the subject motion is accurately set forth in the "Procedural Background" section of the Motion in Support of Charging Party's Motion for Summary Judgment, filed by Counsel for the Acting General Counsel on September 15, 2011 ("AGC Motion"). There is no need to repeat that procedural background here. Respondent does wish to point out, however, that with respect to the elimination of the four Unit positions, the Charge filed on March 25, 2011 (attached to the AGC's Motion as Exhibit "A") is framed in terms of decision-bargaining and the discriminatory discharge of Carole Belanger-Bittle (who held one of the four positions that were eliminated, and who also happened to be the Union's election observer and principal employee organizer). In contrast, the Amended Charge filed on June 16, 2011 (attached to the AGC's Motion as Exhibit "C") alleges the "[f]ailure to bargain over the implementation and effects of the layoff of four [U]nit employees."

Nor does Respondent take issue with the analysis of the pleadings set forth in the Union's Motion for Summary Judgment ("Union's Motion") and in the "Analysis of the Pleadings" section of the AGC's Motion. More specifically, Respondent admits that it:

a. laid off Unit employees Bryan Cook, Roland Cyr, and Carole Belanger-Bittle, and transferred Darren Dumont on or about March 11, 2011.

- b. enhanced its enforcement of its 7:45 a.m. to 4:45 p.m. work hours for the Unit beginning in January of 2011.
- c. required members of the Unit to accept additional duties regarding changes to student schedules beginning about March 30, 2011.

Furthermore, Respondent concedes that the foregoing constitute wages, hours, and other terms and conditions of employment, and that these changes were made after the Union was certified, but without prior notice to the Union, and without affording the Union an opportunity to bargain with Respondent with respect to these changes.

#### <u>ARGUMENT</u>

So what is the issue? Why does Respondent oppose the subject Motion? The answer, very simply, is the failure to separate decision-bargaining from effects-bargaining with respect to the March 11 layoffs and transfer. That is why Respondent answered Paragraph 15 of the Complaint as follows:

15. The allegations contained in Paragraph 15 are conclusions of law to which a response is not required. To the extent that a response is deemed to be required, it is admitted that the subjects set forth in Paragraphs 10 through 14 relate to wages, hours, and other terms and conditions of employment, but it is denied that all of those subjects are mandatory subjects for the purposes of collective bargaining.

From the inception of this case, Respondent has argued, and submitted extensive evidence to the Regional Director in support of that argument, that its decision to reduce what became the Unit by four employees was in response to a Department of Labor mandate, and it was made well prior to its knowledge of any organizing activity by the Union, let alone the Union's certification. Hence, this decision was not (and could not be) a mandatory subject of bargaining.

The Regional Director accepted this argument. Accordingly, she dismissed the Union's allegations regarding the decision to reduce the Unit by four employees (which she characterized as a "layoff"), as well as the alleged discriminatory layoff of Carole Belanger-Bittle. But the

Regional Director also concluded that Respondent's failure to bargain over the implementation and effects of the layoff of the four Unit employees was a violation of Section 8(a)(5) warranting the issuance of a Complaint. Attached, as Exhibit 1, is a copy of a June 14, 2011 email from Field Examiner Hilary A. Bede to the undersigned which memorializes the Regional Director's decision.

## Why the Distinction Between Decision-Bargaining and Effects-Bargaining Makes a Difference

It is well-established that, while reinstatement and backpay from the date of the layoff is the customary remedy for an employer's violation of its duty to bargain over a layoff decision, such a remedy is not appropriate where, as here, the employer's failure to bargain over the layoff decision was not unlawful. Rather, in such cases, where the employer merely violated its duty to bargain over the implementation and effects of its otherwise lawful layoff decision, the appropriate remedy involves only limited backpay, and does not include reinstatement. See Transmarine Navigation Corp., 170 NLRB 389 (1968).

This distinction was set forth very clearly in <u>Lapeer Foundry</u> and <u>Machine, Inc.</u>, 289 NLRB 952. In <u>Lapeer Foundry</u>, after stating that reinstatement and full backpay is the appropriate remedy for an employer's violation of its duty to bargain over its decision to lay off employees, even where those layoffs are economically motivated, the Board inserted the following footnote:

11. By contrast, requiring bargaining over the decision and reinstatement with full backpay does not constitute an appropriate remedy for an effects-bargaining violation. In that situation, the propriety of the employer's decision is not in question. In order to ensure that bargaining will occur over the effects of the decision, however, we order a limited backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), should an employer fail to bargain over the effects. *See Litton Business Systems, supra,* slip op. at 15-16 (Nov. 6, 1987). This limited backpay remedy requires that backpay run from 5 days after the date of the Board's decision until the occurrence of the earliest of

the following conditions: (1) the date the employer bargains to agreement with the union on those subjects pertaining to the layoff about which the employer is required to bargain; (2) a bona fide impasse in bargaining; (3) the failure of the union to request bargaining within 5 days of the Board's decision and order or to commence negotiations within 5 days of the employer's notice of its desire to bargain with the union; or (4) the subsequent failure of the union to bargain in good faith; but "in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the dates on which he was laid off or terminated to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. [Id., slip op. at 16.]"

Id. at n.11.

#### **Confusion in Complaint**

The matter at hand is somewhat confusing in that the Complaint does not, on its face, seek reinstatement or backpay. However, the June 14 email memorializing the Regional Director's decision to authorize a Complaint (Exhibit 1) states, in pertinent part:

[The Regional Director] has authorized a complaint regarding the following violations of 8(a(5):

• Failure to bargain over the implementation and effects of the layoff of four unit employees. The layoff itself was unavoidable and settled with the Department of Labor prior to the Union's certification; the implementation was not. The Region will seek the reinstatement of the laid off employees as a remedy.

(Emphasis added).

Furthermore, both the Union's Motion, as well as the AGC's Motion, seem to assume that the Complaint seeks reinstatement and full backpay for the four employees who were separated. Thus, the top of page 2 of the Union's Motion states that "further delay in reinstating

<sup>&</sup>lt;sup>1</sup> For the reasons set forth above, it is Respondent's position that reinstatement of the laid off employees as a remedy, given the finding that the layoff decision, which was not bargained with the Union, was not unlawful, is plainly erroneous as a matter of long-settled Board law.

the laid off and transferred employees should not be further delayed." Similarly, Paragraph 4 of the "Conclusion" in the AGC's Motion (p. 8) requests the issuance of an appropriate remedial order requiring that Respondent, among other things, ". . . reinstate the laid off or transferred employees, and make them whole."

If, consistent with the face of the Complaint, the only issue to be addressed with respect to the four separations at the now indefinitely postponed hearing is whether Respondent failed to bargain over the implementation and effects of an otherwise lawful decision to eliminate the four Unit positions, and the remedy for such failure is not reinstatement, but rather the limited backpay remedy set forth in Transmarine, then there would appear to be no need for a hearing on this issue. If, however, contrary to the determination of the Regional Director, the AGC intends to take the position that the decision to eliminate the four Unit positions was an unlawful failure to bargain over a mandatory subject of bargaining and/or that the appropriate remedy with respect to the four eliminated positions is reinstatement and full-backpay going back to March 11, 2011, then the Complaint should be amended accordingly, and Respondent should be given the opportunity to respond to such Amended Complaint.<sup>2</sup> To grant the pending Motion under the latter circumstances would be a gross violation of Respondent's right to due process.

<sup>&</sup>lt;sup>2</sup> In any event, there would appear to be no need for a hearing or Amended Complaint with respect to the work hours issue and the additional duties issue raised, respectively, in Paragraphs 11 and 13 of the Complaint. In contrast, all parties are agreed that there are disputed issues of material fact regarding the allegations set forth in Paragraphs 12 and 14 of the Complaint.

## **CONCLUSION**

For all of the foregoing reasons, the Motion should be denied.

Date: November 2, 2011

Respectfully submitted

Jeffrey L. Braff

COZEN O'CONNOR

1900 Market Street

Philadelphia, PA 19103-3508

215-665-2000

Attorneys for Respondent

Career Systems Development Corporation

# EXHIBIT 1

#### **Braff, Jeffrey**

From:

Bede, Hilary A. [Hilary.Bede@nlrb.gov] Tuesday, June 14, 2011 2:48 PM

Sent: To:

Braff, Jeffrey

Subject:

RE: Career Systems Development Corporation, 1-CA-46727

Follow Up Flag: Flag Status:

Follow up Flagged

I received your 6/14/11 letter. Thank you.

The Regional Director has made her decision.

She has decided to dismiss the following allegations:

- · Change in class size.
- Layoff of employees.
- · Discriminatory discipline of Union organizer.
- · Discriminatory layoff of Union organizer.
- · Change in student hours.
- · Change in cleaning duties.

She has authorized a complaint regarding the following violations of 8(a)(5):

- Failure to bargain over the implementation and effects of the layoff of four unit employees. The layoff itself was unavoidable and settled with the Department of Labor prior to the Union's certification; the implementation was not. The Region will seek the reinstatement of the laid off employees as a remedy.
- Failure to bargain over the newly enforced hours of work.
- Failure to bargain over change to TABE tests scores required to enter GED class.
- Failure to bargain over change to student schedule adjustment policy.
- Failure to bargain over change to required meetings.

I will call you soon discuss this decision in more detail; or feel free to call me when you get a chance.

Hilary

Hilary Bede National Labor Relations Board, Region 1 10 Causeway Street Boston, MA, 02222 Phone:617-565-6744 Fax: 617-565-6725

#### **CERTIFICATE OF SERVICE**

I, Jeffrey L. Braff, hereby certify that I have caused to be served a true and correct copy of Respondent's Opposition to Motion for Summary Judgment via email, this 2<sup>nd</sup> of November, 2011 on the following counsel of record:

Robert J. DeBonis, Counsel for the Acting General Counsel National Labor Relations Board, First Region Thomas P. O'Neill, Jr. Federal Building 10 Causeway Street, 6<sup>th</sup> Floor Boston, MA 02222-1072 Robert.debonis@nlrb.gov

Jonathan S.R. Beal, Esquire 114 Noyes Street P.O. Box 1400 Portland, Maine 04104 <u>jbeal@maine.rr.com</u> and <u>jbeal@jonathansrbeal.com</u>